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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-1064**

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

*Appellants,*

*v.*

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

*Appellees.*

**On Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania**

## BRIEF AND APPENDIX OF *AMICUS CURIAE* DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY STATE OF NEW JERSEY

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## Summary of Argument

The Department of the Public Advocate, Division of Mental Health Advocacy, a statutory agency, has, since September 8, 1975, provided legal representation to individuals facing civil commitment proceedings, including juveniles, pursuant to *New Jersey Court Rule* 4:74-7, under a procedural format similar to the one mandated by the Federal District Court in the instant case (Point I.A, B). *Amicus'* experience in providing such representation effectively rebuts those arguments raised by appellants alleging exacerbation of familial situations and traumatization of the child (Point I.C.).

Similarly, relevant case law, scholarly literature and available empirical evidence further rebut such arguments by appellant. (Point II).

*Amicus* supports the judgment of the court below with respect to its findings of right to counsel, notice, presence at the hearing, and confrontation and cross-examination of witnesses, at such hearings. *Amicus* respectfully takes exception to the District Court's finding with respect to standard of proof (Point III).

IN THE

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OCTOBER TERM, 1975

**No. 75-1064**

JACK B. KREMENS, Individually and as Hospital Director of Haverford State Hospital; FRANK S. BEAL, Individually and as Secretary of Public Welfare of the Commonwealth of Pennsylvania; WILLIAM B. BEACH, JR., Individually and as Deputy Secretary for Mental Health and Mental Retardation of the Department of Public Welfare of the Commonwealth of Pennsylvania,

*Appellants,*

*v.*

KEVIN BARTLEY; STEVE GENTILE; LESLIE LEVINE; VICKI MATHEWS; MARK WEAND; Minors, Through Their Next Friend, Individually and on Behalf of All Others Similarly Situated,

*Appellees.*

**On Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania**

## BRIEF OF *AMICUS CURIAE* DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF MENTAL HEALTH ADVOCACY STATE OF NEW JERSEY

## Interest of *Amicus Curiae*

The instant appeal presents the very important issue of what process is due to juveniles facing civil commitment proceedings. *Amicus curiae,* Department of the Public Advocate, Division of Mental Health Advocacy, is an administrative agency of the State of New Jersey statutorily authorized to represent—both individually and on a class action basis—persons subject to such proceedings, on any issue pertinent to the commitment to, release from, or confinement in mental institutions throughout the State.[1] In such capacity, the Division of Mental Health Advocacy has undertaken to represent both adults and juveniles in commitment matters through procedures very similar to those mandated by the District Court's judgment on review here.

As will be discussed further, *infra* (see Point I.A.) the Division of Mental Health Advocacy has established field offices in two counties to provide representation, on an individualized basis, at commitment proceedings, periodic review hearings, and individual matters concerning conditions of confinement or release.[2] Through this brief, the

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[1] For a discussion of the nature and scope of functions served by the Department of the Public Advocate in general, and the Division of Mental Health Advocacy in particular, see, Note, "The Office of Public Counsel: Institutionalizing Public Representation in State Government", 64 *Georgetown L.J.* 895, 900-902 (1976). See also, Penn, "Advocate From Within", 12 *Trial Magazine* 20, 23 (February 1976).

[2] As noted *infra,* the decision to establish two field offices was primarily a result of the available financial allocations. The entire Division operates on an annual budget of $550,698.00. The two counties

*(Footnote continued on following page)*



Division of Mental Health Advocacy hopes to apprise this Court of its experience in providing legal representation to juveniles subject to the civil commitment process.

The Division of Mental Health Advocacy files this brief as *amicus curiae* with the consent of all parties to this appeal. See, letter from Barry A. Roth, Assistant Attorney General of Pennsylvania, to David Ferleger, Esq., dated May 11, 1976, set forth in the Appendix at 1a.

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*(Footnote continued from preceding page)*

combined accounted for approximately 32.8% of the involuntary commitment proceedings initiated statewide in calendar year 1975 (total number of cases docketed January-December 1975: 3,338; of those, 898 were from Essex County, and 199 were from Mercer County). With respect to persons presently hospitalized (and thereby eligible for Division services) as of the filing of this brief, the total institutionalized population in New Jersey (including state, county, federal, and private facilities) is 5,590; of these, 1,540 are Essex County residents and 273 are Mercer County residents. Thus the two counties combined account for 32.4% of the current patient population.

# ARGUMENT

## I. The New Jersey Department of the Public Advocate, Division of Mental Health Advocacy has, since September 8, 1975 provided juveniles facing civil commitment proceedings representation in a manner similar to the procedural format mandated by the Court below.

### A. The Division of Mental Health Advocacy is a statutory agency of the State of New Jersey charged with the responsibility to provide legal representation to individuals subject to involuntary civil commitment proceedings.

The Division of Mental Health Advocacy, a State agency within the New Jersey Department of the Public Advocate, has express statutory authority to

> provide such legal representation and medical consultation as the director deems appropriate for any indigent mental hospital admittee in any proceeding concerning the admittee's admission to, retention in, or release from confinement in such a hospital, institution or facility. N.J.S.A. 52:27E-24.

Pursuant to this statutory grant, and consonant with the available fiscal appropriations, the Division of Mental Health Advocacy (hereinafter "the Division") has established two field offices to provide legal counsel to individual "indigent mental hospital admittees."[3] These offices

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[3] The Division also maintains a class action office, located in Trenton, with statewide jurisdiction and the statutory authority to

> represent the interests of indigent mental hospital admittees in such disputes and litigation, as will, in the discretion of the Director . . . best advance the interests of indigent mental hospital admittees as a class on an issue of general application to them. . . . N.J.S.A. 52:27E-25.



are located in Newark and Trenton. The former, designated the Essex Regional Office, provides representation at commitment hearings, periodic review hearings,[4] *habeas corpus* hearings, and individual cases involving conditions of treatment or confinement; the population served by this Office is comprised of all Essex County residents who are or may become institutionalized anywhere in the State, as well as the entire patient population at the Essex County Psychiatric Hospital in Cedar Grove. The Trenton office, denominated the Mercer Regional Office, provides the same four types of services to all residents of Mercer County facing institutionalization, including those residing at Trenton Psychiatric Hospital.[5]

The regional offices are staffed by attorneys (three in Trenton, four in Newark) and "field representatives" (three in Trenton, three in Newark). This latter term denotes non-lawyer staff personnel who are, by virtue of background training and prior work experience, mental

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[4] On November 12, 1974, Chief Justice Richard J. Hughes of the New Jersey Supreme Court issued Memorandum #4-74 to all assignment judges, trial court administrators and county clerks, establishing among other procedures, a schedule of periodic reviews of "all persons who are now, or may hereafter become, involuntarily committed" in the State. The memorandum also mandated docketing and scheduling procedures for final commitment hearings which essentially presaged the current N.J. Ct. R. 4:74-7. The full text of the memorandum is set forth in the Appendix at 2a-6a.

[5] The Mercer Regional Office has also assumed responsibility for providing representation to clients residing in Hunterdon County, a smaller, less urban area adjacent to Mercer County. In the past, this office has also provided services to Somerset County residents; since the adoption of N.J. Ct. R. 4:74-7(c)(2), however, responsibility for this representation has been assumed by Somerset County.

health professionals.[6] Although conceived of, by statute, as "law offices", the regional offices operate, in practical effect, as a partnership among all professionals on the staff. The ultimate service provided may be "legal" in nature (*i.e.* serving as counsel or, in the case of a juvenile, as guardian *ad litem* as well, at a legal proceeding such as a commitment hearing or a periodic review) but input into the final result comes from all staff members. The field representative interviews the patient/client initially,[7] and gathers all data pertinent to the type of legal representation called for. In the case of a commitment hearing, the field representative will ascertain (1) the client's current medical/psychological condition as evidenced both by the hospital records and by the field representative's assessment of the client at the time of the interview; (2)

[6] In the Trenton office, the supervising field representative holds a Masters of Divinity degree and had six years of experience in mental health related fields prior to coming to the Division; another field representative holds a Bachelor of Arts degree and had four years prior experience as a social worker; the third field representative holds an Associate of Arts degree and has had two years prior experience in mental health related areas.

Two field representatives in the Newark office hold Masters degrees, one in Psychology, and one in Social Work, and together have more than two years prior experience in mental health related areas. The third holds a Bachelor of Arts degree and had one-and-a-half years prior work experience in related areas.

[7] In the case of a commitment hearing, where the client has been hospitalized under a temporary commitment order, under N.J.S.A. 30:4-37 and 30:4-38, the name is referred to the appropriate regional office by the Office of the County Adjuster in the county of the patient's residence. In the case of periodic reviews (see n.4 *supra* at p. 4), the names of patients whose hearings have been scheduled are referred to the appropriate regional office by the Office of the County Clerk in the county of the patient's residence.



the client's background—both social and medical—and current family situation; (3) the availability of alternative care facilities appropriate to the client's needs; (4) the need for recruiting independent psychiatric testimony to present on behalf of the client at the hearing. For periodic reviews, the field representative will obtain information pertinent to (1) through (4) above, and, in addition, will review the patient's history of hospitalization to evaluate the nature of the care and treatment rendered in an effort to determine if continued hospitalization is appropriate.

The field representative then confers and works closely with the attorney to develop the appropriate legal strategies in light of the individual patient/client's needs and desires. The attorney appears at the hearing as the patient/client's advocate, to advance that individual's desires to the maximum extent feasible. All final legal decisions concerning a given patient are thus bottomed on a joint effort by the two professions represented on the Division's staff.[8]

[8] The Division of Mental Health Advocacy thus provides representation in both individual and class matters in the systemic, organized way contemplated in and urged by the relevant scholarly literature. See, *e.g.*, Andalman and Chambers, "Effective Counsel for Persons Facing Civil Commitment: A Survey, Polemic and a Proposal", 45 *Miss. L.J.* 43, 75-76 (1974); Litwack, "The Role of Counsel in Civil Commitment Proceedings: Emerging Problems", 62 *Calif. L. Rev.* 816, 826, 839 (1974); Note, "The New York Mental Health Information Service: A New Approach to Hospitalization of the Mentally Ill", 67 *Colum. L. Rev.* 672, 689 (1967). For critiques of the role of the occasional or assigned counsel in such matters, see, *e.g.*, Cohen, "The Function of the Attorney and the Commitment of the Mentally Ill", 44 *Tex. L. Rev.* 424, 448, 450, 457-458 (1966); Weihofen, "Mental Health Services for the Poor", 54 *Calif. L. Rev.* 920, 939 (1966); "Developments in the Law—Civil Commitment of the Mentally Ill", 87 *Harv. L. Rev.* 1190, 1288 (1974) (hereinafter "Developments"); Comment, "Liberty and Required Mental Health Treatment", 114 *U. Pa. L. Rev.* 1067, 1068-1070 (1966).

**B. Procedural rights for all individuals, including juveniles, facing commitment to a mental institution have been codified in N.J. Ct. R. 4:74-7, effective September 8, 1975.**

Prior to September 8, 1975, New Jersey civil practice rules provided that a person facing civil commitment receive written notice of the time and place of the final hearing "at least *one day* before the date fixed" N.J. Ct. R. 4:74-7(e) (1969 Rev.) (emphasis added). If the patient was not confined prior to the hearing, service was to be upon him or her personally or upon his or her attorney; if the patient was in an institution prior to the hearings, the county adjuster was required to effect personal service. The prior rules further provided that the "notice shall contain a statement that if the patient desires to oppose the application for a final judgment of commitment, he may appear personally or by attorney at the time and place fixed for the final hearing." *Id.* The decisions whether to hold an actual hearing and whether to have the patient present were completely discretionary with the court. N.J. Ct. R. 4:74-7(f) (1969 Rev.).

Contemporaneously with the institution of litigation challenging the constitutional deficiencies in New Jersey's civil commitment practice under the statutes (N.J.S.A. 30:4-27 *et seq.*) and the rule, the Supreme Court's Civil Practice Rules Committee undertook to revise N.J. Ct. R. 4:74-7. In *In re Geraghty,* 68 N. J. 209, 343 A. 2d 737 (1975), the New Jersey Supreme Court was confronted with the contention that due process requirements, under the Fourteenth Amendment to the United States Constitution and Art. I, Para. 1 of the New Jersey Constitution, mandated affording persons subject to civil commitment proceedings the full panoply of procedural due process guarantees of notice, hearing, right to be present,



confrontation of witnesses, and especially the right to be represented by counsel.

Prior to the Supreme Court's decision in *Geraghty,* the newly revised N.J. Ct. R. 4:74-7 (1975 Rev.) was adopted. The full text of this rule is set forth in the Appendix at 7a-10a. The combined net effect of the current rule and pertinent statutes (N.J.S.A. 30:4-27 *et seq.*) is that civil commitment proceedings in New Jersey now involve, at the least, the following procedural provisions, as a matter of practice:[9]

(1) An order for temporary commitment must be based on an application supported by the typewritten certificates of two physicians licensed in the State of New Jersey, wherein each physician

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[9] Another challenge to the New Jersey civil commitment practice had been lodged in October 1973, in a federal court suit questioning the constitutionality of N.J.S.A. 30:4-37; 4-38; 4-41; and 4-42, as well as N. J. Ct. R. 4:74-7(b),(c), and (e). *Coll* v. *Hyland,* 411 F. Supp. 905 (D. N.J. 1976). The decision of the three-judge court in *Coll* was subsequent to the adoption of the 1975 revision of N. J. Ct. R. 4:74-7 and the decision in *In re Geraghty, supra.* Therefore, the Court weighed Coll's constitutional challenges in light of the new Rule and stated: "[W]e confine our inquiry to the constitutionality of the current rules of court, which are substantially different from those previously in effect." 411 F. Supp. at 907. The Court found the current New Jersey rule to provide constitutionally adequate procedural protections to persons facing involuntary civil commitment. Specifically, the Court rejected Coll's contention that a preliminary hearing was constitutionally required, citing the 20-day limit for final hearings in the New Jersey rule. The *Coll* Court went on to find that the procedures codified by the current New Jersey rule met constitutional muster. "After a thorough review of the New Jersey statutes and procedural rules governing civil commitments, we conclude that constitutional standards have been met. Accordingly, judgment will be entered in favor of the defendants." 411 F. Supp. at 913.

shall state the particular facts relied upon to support commitment;

(2) Such order must provide for a day and place certain on which the final commitment hearing is to be held, which shall be no more than 20 days from either the filing of the application, or the date of the temporary commitment order, or the date of admission of the client to the institution, as the case may be;[10]

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[10] N.J.S.A. 30:4-25 provides:

Classes of commitment

For the purpose of this Title the method of commitment of mentally ill patients shall be divided into 5 classes:

Class A. Where immediate temporary confinement in an institution is not necessary before making final order of commitment.

Class B. Where immediate temporary confinement is necessary, owing to the condition of the patient, and where an order of temporary confinement can be obtained before the patient is taken into such institution.

Class C. Where immediate confinement in an institution before making the temporary order hereinafter referred to is necessary, owing to the condition of the patient, and where an order of temporary commitment cannot be obtained before the patient is taken into such institution.

Class D. Where a person voluntarily applies for admission to an institution for treatment. In all such cases the admission and maintenance shall be governed by the provisions of section 30:4-46 of this Title.

Class E. Where a person in confinement, under care of the chief executive officer of any correctional institution, is to be transferred to an institution for treatment. In all such cases the procedure shall be governed by the provisions of section 30:4-82 of this Title.



(3) Counsel must be appointed, by the temporary commitment order, to unrepresented clients, and juveniles shall be assigned guardians *ad litem* who must be attorneys;

(4) Notice of the final hearing, which must be served *no less than* 10 days prior to such hearing, shall be personally served upon the patient, and shall also be served on the patient's counsel or guardian *ad litem,* the nearest relatives of the patient, the county adjuster and the superintendent of the institution where the patient is confined if such is the case;

(5) The patient, through counsel, has broad discovery rights, *cf. Patients* v. *Kallen,* 123 N. J. Super. 175, 302 A. 2d 142 (App. Div. 1973), as well as the right to the appointment of independent psychiatric experts without charge to the patient, *cf. In re Gannon,* 123 N. J. Super. 104, 301 A. 2d 493 (Somerset Cty. Ct. 1973); *Matter of Alfred,* 137 N. J. Super. 20, 347 A. 2d 539 (App. Div. 1975);

(6) Oral testimony must be taken at the final commitment hearing from a licensed physician who has examined the patient since the date of the temporary order;

(7) The patient must be present at the hearing unless good cause is shown for excluding him or her;

(8) A final order of commitment shall provide a schedule of periodic reviews to be conducted in the manner required for final commitment hearings;

(9) If an order is entered, at the final commitment hearing discharging a temporarily confined patient, such order may establish conditions for discharge such as attendance at a mental health care facility on an out-patient basis, *cf. State* v. *Carter,* 64 N. J. 382, 316 A. 2d 449 (1974).

Minors are afforded the same procedural protections as adults in civil commitment proceedings irrespective of who makes the original application for the minor's commitment. Specifically with respect to juveniles, N. J. Ct. R. 4:74-7(j) provides:

> Commitments of Minors. No minor shall be committed except temporarily to a mental institution for treatment and care of an alleged mental condition on the application of his parent or parents or other person in loco parentis except on court order after hearing pursuant to paragraph (e) hereof. A guardian ad litem who shall be a person other than the applicant for the commitment, shall be appointed by the court to represent the interests of the minor at such hearing.

The comment to this section of the rule indicates that it is "intended to prevent a so-called voluntary commitment of a minor by his parent or other person in loco parentis".[11] Pressler, *Current N. J. Court Rules,* Comment

[11] N.J.S.A. 30:4-46, entitled "Voluntary application for admission for treatment", provides, in pertinent part:

> [A] minor under the age of [18] in whose behalf an application for voluntary admission has been made by a parent or guardian or by a grandparent or adult brother or sister, may be admitted to any public or private mental hospital by filing, or having filed in his behalf, with the chief executive officer, at the time of his admission, an application in writing to be approved and furnished by the board of managers or the board of chosen freeholders or the private mental hospital, as the case may be. . . .



R. 4:74-7, at 803. N. J. Ct. R. 4:74-7(c)(2) provides: "If the patient is a minor, a guardian ad litem shall be appointed who shall be an attorney." When read together, the two sections clearly indicate that the role of the attorney envisioned by the Rule with respect to juveniles is that of attorney *and* guardian *ad litem.* This flexible posture enables the attorney to employ all available resources—legal, medical and social, institutional and non-institutional—to achieve a judicial result appropriate to the particular needs and wishes of the individual juvenile.[12]

**C. In those juvenile commitment cases in which juveniles were represented by *Amicus,* Department of the Public Advocate, Division of Mental Health Advocacy, there has been no evidence of exacerbation of familial situations; on the other hand, the dispositions bespeak individualized treatment by counsel and individualized determinations by the Court.**

The revision of N. J. Ct. R. 4:74-7, effective September 8, 1975, guaranteed that thenceforth civil commitment proceedings of juveniles would be considered adversarial in nature to the extent that all procedural protections afforded to adults in such matters are to be extended to juveniles.

Since the promulgation of the revised rule, Division field offices have undertaken to provide—in Mercer and Essex counties—attorney and guardian *ad litem* services as required by N. J. Ct. R. 4:74-7(c)(2) and (j). This has involved the delivery of the four types of services discussed *supra* at p. 5, but on a somewhat broader level

[12] See further discussion on the role of counsel generally at Points I.C and II, infra.

than for adult clients. As will be discussed further below, the assignment of a guardian *ad litem* role to Division attorneys has placed these attorneys in a unique position *vis-à-vis* the court and the applicant for commitment. The role of counsel in juvenile commitment proceedings, as effectuated by Division attorneys, has taken on new dimensions of responsibility and authority.

As of mid-July, 1976, the two field offices combined have represented approximately 77[13] juveniles since September 8, 1975. The vast majority of these clients have been between the ages of fourteen and seventeen, although the Division has represented children as young as seven years of age.[14]

In the 71 juvenile cases closed by the Mercer and Essex County field offices of *amicus* Department of the Public Advocate, Division of Mental Health Advocacy, since the

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[13] This number indicates those juveniles represented, by Division staff, both at civil commitment proceedings and at periodic review hearings. It should be noted that the class of juveniles served by the Division is distinguishable from the plaintiff class in *Bartley* insofar as the latter class includes juveniles subject to placement in facilities for the mentally retarded, while the former is limited to juveniles currently residing in, or facing commitment to, a "mental institution for treatment and care of an alleged mental condition" [N. J. Ct. R. 4:74-7(j)]—*i.e.* a *psychiatric* facility. At present in New Jersey, procedures for admission to any of the State services for the mentally retarded (State schools, residential services, day care training services) are either essentially administrative in nature or are integrated into otherwise pending juvenile court proceedings, and therefore are not subject to the provision of N. J. Ct. R. 4:74-7. See N.J.S.A. 30:4-25.1, 4-25.6.

[14] As of July 16, 1976, the precise break-down in terms of age levels was as follows: age 7-1; age 8-1; age 9-1, age 11-1; age 12-2; age 13-3; age 14-6; age 15-15; age 16-19; age 17-24.



September 1975 revision to N. J. Ct. R. 4:74-7(j),[15] the dispositions reveal a pattern of individualized court determinations.[16] In addition, the dispositions of the cases reveal that counsel—in New Jersey—fulfills those multiple functions urged by respected commentators. See, *e.g.*, Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions", 62 *Calif. L. Rev.* 840, 888-890 (1974) [hereinafter "Volunteering Children"] (discussed specifically at Point II, p. 31, *infra*); see also Stone, *Mental Health and Law: A System in Transition* 59, 233-237 (1975).

Thus, of the 71 closed files, 19 of the juveniles were discharged following the involvement of *amicus* as counsel but prior to a formal hearing, six were released at such a hearing (in virtually all cases to their parents' or guardian's custody), eight were "discharged pending placement,"[17] four were "discharged pending placement" to a facility administered by New Jersey's Division of Mental Retardation,[18] two were "discharged pending place-

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[15] As of the preparation of this brief, six cases remain open.

[16] All statistics are on file with *amicus* Department of the Public Advocate, Division of Mental Health Advocacy.

[17] The phrase "discharge pending placement"—apparently unique to New Jersey practice—covers those cases in which orders are entered discharging patients subject to the availability of a suitable alternative care or aftercare facility. These orders are usually accompanied by retention of jurisdiction by the Court to insure that the placements are, indeed, made within the specific time limits contained in the order. *Cf. Dixon* v. *Weinberger*, 405 F. Supp. 974 (D.D.C. 1975).

[18] See generally, N.J.S.A. 30:4-165.1 *et seq.*

ment" to a residential school,[19] one was discharged to the custody of Division of Mental Retardation officials, three were discharged subject to certain conditions,[20] one was transferred to an out-of-state hospital,[21] one was ordered admitted to a special education program while institutionalized,[22] and three were remanded to local jails or youth detention facilities to await trial on criminal offenses or hearings on juvenile deliquency petitions. In addition, in two cases, adjournments were entered (so as to facilitate residential school placement and to avert the potentially stigmatic effect of a commitment label),[23] and in ten cases, voluntary applications were accepted.[24] Finally, in 11 cases, commitment was ordered.[25]

These statistics reflect, then, individual determinations on individual bases. Dispositions are not limited to a finite commit/release paradigm (a fear often articulated by those who see the involuntary civil commitment pro-

[19] See generally, N.J.S.A. 18A:46-9, 13, 14, 15 (amended July 1, 1976).

[20] *E.g.*, that the juvenile participate in a specific aftercare program.

[21] See generally, N.J.S.A. 30:7B-1 *et seq.*

[22] This, *e.g.*, required the release of certain funds by the board of education in the municipality in which the juvenile resided. See generally, N.J.S.A. 18A:46-13, 14 (amended July 1, 1976).

[23] See generally, "Volunteering Children", *supra*, at 845-848.

[24] See *In re Williams*, 140 N. J. Super. 495, —— A. 2d —— (Essex Cty. J.D.R. Ct. 1976).

[25] Of these eleven cases, five juveniles have subsequently been discharged and one other has been "discharged pending placement."



cess as taking on all of the trappings of the criminal trial);[26] on the other hand, they are specifically structured so that an individualized determination can be made, following the full participation of counsel at all relevant stages of the proceedings,[27] in the manner contemplated by, *inter alia*, Ellis, Stone and Cohen, all *supra*.

Indeed, the roles played by *amicus* in the cases in question have gone far beyond simple trial representation: in many of those cases in which *amicus* was appointed guardian *ad litem* as well as counsel,[28] orders were entered continuing the Division as guardian *ad litem* beyond the actual formal commitment (or acceptance of the voluntary application) so as to facilitate and insure the implementation of an aftercare plan. In other cases, *amicus* has played an active role in such areas as facilitation of school placement,[29] assisting the family in obtaining an appropriate community education program for the juvenile,[30] representing juveniles on individualized right to treatment,[31] or right to obtain Medicaid funds,[32] facilita-

[26] See, for such a view, Peszke, *Involuntary Treatment of the Mentally Ill* (1975).

[27] The periodic review process is, of course, available to juveniles in New Jersey in the same manner as it is to adults. See N. J. Ct. R. 4:74-7(f), (j).

[28] See N. J. Ct. R. 4:74-7(j).

[29] A corollary of such a role is, of course, its inverse: *amicus* also has acted to deter inappropriate placements.

[30] See generally, N.J.S.A. 18A:46-14 (amended July 1, 1976).

[31] See, *e.g.*, N.J.S.A. 30:4-24.1 (amended May, 1975); *In re D.D.*, 118 N. J. Super. 1, 285 A. 2d 283 (App. Div. 1971).

[32] See generally, 42 U.S.C.A. § 1395 *et seq.*

tion of an available family therapy program, provision of independent psychiatric expertise to the family so that the juvenile could readjust to his home setting after commitment,[33] resolution of conflicts between social service agencies (*e.g.,* Division of Youth and Family Services) and the juvenile's family, and finding suitable aftercare or alternative care placements. These various functions, again, reflect a "counseling attitude" that far transcends the narrow range of choices often feared as a necessary concomitant to the presence of adversarial counsel.

In addition, it appears that—in most cases—parents were affirmatively pleased with the involvement of *amicus.* Although parents were hostile to the role of adversary counsel in a handful of cases, in the vast majority, parents were described by *amicus* counsel as "enthusiastic about our involvement," "thankful for involvement," "receptive," "cooperative," "positive," "helpful," and "interested and informative." Interestingly, in at lease four cases, parents who began with "negative" feelings or who were "uncooperative" with counsel, radically changed their attitudes during the course of representation and became "positive" or "cooperative" by the time of the final hearing.[34] In these cases, it would appear that counsel had the precise opposite effect of that feared by appellants: rather than

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[33] In this case, following acceptance of the juvenile's own voluntary application, he was subsequently discharged and is now receiving out-patient treatment at home.

[34] As part of the preparation of this brief, the Mercer and Essex Regional Offices of the Division of Mental Health Advocacy were asked for statistical read-outs on their respective juvenile cases. One statistical category asked for "response of family" (to legal representation of the juvenile by Division attorneys), in response to which subjective answers such as those appearing in the text were received.



exacerbating tensions, the presence of counsel actually served to alleviate such feelings and strengthen interfamilial bonds.[35]

Finally, the presence of counsel has led to exceptional judicial creativity in an area in which, most likely, such creativity would be conspicuously absent but for the presence of an adversarial role. In *In re Pamela T.,* Docket No. ESCC 16-68 (Essex Cty. J.D.R. Ct. 1975), a "treatment program" mainly consisting of over 200 electroshock applications and 23 hours a day in seclusion—structured in response to the "behavior problems" of a young girl with an organic brain condition—was struck down as violative of the Eighth Amendment's ban on cruel and unusual punishment;[36] in *In re Williams,* 140 N. J. Super. 495, 499, —— A. 2d —— (Essex Cty. J.D.R. Ct. 1976), the court held that a juvenile—on his own—could voluntarily admit himself to an institution (thus avoiding the stigma inherent in an involuntary commitment) if he "understood the nature of a voluntary commitment and grasped the significance of the . . . proceedings"; in *In re D.G.,* Docket No. HNCC 1-76 (Hunterdon Cty. Ct. 1976), the court held that all documents and records pertaining to the involuntary commitment proceeding be impounded

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[35] Another phenomenon worth noting is that, in those cases in which counsel either represented the juvenile on treatment questions or actively sought an after-care or out-patient program, in virtually all instances, parents were especially positive about Division of Mental Health Advocacy involvement.

[36] *Cf. Rozecki* v. *Gaughan,* 459 F.2d 6, 7 (1 Cir. 1972). The *Pamela T.* case received widespread press attention following entry of the court order. See, *e.g.,* Jaffe, "'Horror Story' at Greystone Ends for Girl", *Newark Star-Ledger,* Vol. 62, No. 79, p. 1, col. 7 (May 12, 1975). All orders in juvenile commitment cases are on file with the Division of Mental Health Advocacy.

"to protect the interests of the juvenile." Finally, in *In re G.G.*, Docket No. MECC 164-75 (Mercer Cty. Ct. 1975), in which *amicus* represented a juvenile whose condition had been gravely deteriorating on whom psychotropic medication was having no positive effect, and where both the juvenile's independent psychiatric expert witness and the hospital physician advocated the use of electroshock, *amicus* petitioned the court to determine the need for such treatment.[37] Following the hearing, the treatment was ordered and administered, and the juvenile has been subsequently discharged.[38]

Cases such as these reflect the end results of the presence of counsel: the presentation to the courts of individual cases in a manner susceptible to individualized, creative determinations. Clearly, fears such as those expressed by appellants as to the involvement of counsel

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[37] In a letter to the Court, the attorney arguing the case stated:

> In the case at hand, I believe it should be the role of counsel, not to blindly resist treatment, but to assist the court in monitoring the decision process of the medical professionals. . . . To this end, I intend to elicit testimony at the forthcoming hearing regarding the availability of alternatives to electroshock therapy, the risks associated with its use, and the chances for negative results in addition to testimony supporting the use, so that a detailed background will exist upon which the Court may render its decision.

Letter from Herbert D. Hinkle, Esq., counsel for juvenile, to Honorable George Y. Schoch, Assignment Judge, Superior Court, Law Division, Mercer County, N.J., November 26, 1975, in *In re G.G.* *supra*.

[38] This case is described in greater detail in Perlin, "The Right to Refuse Treatment in New Jersey", 6 *Psychiatric Annals* 300, 304 (1976).



appear groundless. A system which affords counsel and other procedural protections to juveniles facing commitment is eminently workable.

## II. There is no empirical evidence that appointment of independent counsel to represent juveniles facing commitment either "traumatizes" the child or "heightens intrafamilial hostilities".

In suggesting that the District Court's decision will lead to an "exacerbat[ion]" of problems, and a heightening of "intrafamilial hostilities", Ab at 45, through an experience "traumatizing for the child and for the family," Ab at 36, fn. 28, appellants cite no empirical evidence, save one unpaginated allusion to—apparently—the transcript below, *id.*, and the reference to one family law journal article, *id.* It is submitted that their bald assertions are groundless, and that, on the other hand, those statistical surveys which *have* been done in analogous fields, paint a picture diametrically opposed to that suggested by appellants.[39]

It is clear that counsel plays a critical, and in some cases, nearly dispositive role in involuntary commitment

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[39] Indeed, the article so cited by appellants—Duncan, "Recognition and Protection of the Family's Interests in Child Abuse Proceedings," 13 *J. Family L.* 803 (1973)—notes that, when the rights of parents and child "come into conflict . . . it is the duty of the state to resolve the conflict, and at the same time make every effort to protect the rights of all the parties involved," *id.* at 806, that this conflict "can only be resolved by a judicial proceeding", *id.*, and that, "where the state can not adequately represent all the interests of the child, *due process may require separate counsel for the child*," *id.*, at 812 (emphasis added). These arguments clearly do not buttress appellants' approach.

proceedings—where active attorneys are employed, fewer persons are committed, "Developments," 87 *Harv. L. Rev., supra,* at 1285; Wenger and Fletcher, "The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions," 10 *J. Health and Soc. Behavior* 66, 69 (1969) (74% of represented persons studied were released; only 9% of those not represented discharged); Kumasaka and Stokes, "Involuntary Hospitalization: Opinions and Attitudes of Psychiatrists and Lawyers," 13 *Comprehensive Psych.* 201 (1972); Kramer, "Protective Legal Services for the Mentally Ill," 23 *Hosp. and Commun. Psych.* 41, 42 (1972) (study of Mental Health Information Service in New York revealed 40.4% of all patients requesting hearings through counsel released by hospital psychiatrists prior to hearing), and that "intervention by counsel acting as patient's attorney tremendously increases chances of discharge, not to mention the other alternatives to hospitalization that may also be worked out to the patient's satisfaction," Gupta, "New York's Mental Health Information Service: An Experiment in Due Process," 25 *Rutgers L. Rev.* 405, 438 (1971). See also, Silverberg, "The Civil Commitment Process: Basic Considerations", 1 *Legal Rights of the Mentally Handicapped,* 103, 109 (Ennis and Friedman eds. 1973).[40]

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[40] Significantly, this conclusion was adopted in *Lessard* v. *Schmidt,* 349 F. Supp. 1078, 1099 (E.D. Wis. 1972), vacated on other procedural grounds, 414 U.S. 473 (1974), on remand 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded on other grounds 421 U.S. 957 (1975), as evidence that the traditional guardianship appointment does not satisfy constitutional requirements for counsel as it is not sufficiently an advocacy role. See also, Dix, "Hospitalization of the Mentally Ill in Wisconsin: A Need for Reexamination," 51 *Marq. L. Rev.* 1, 33 (1967); *Quesnell* v. *State,* 83 Wash. 2d 224, 517 P. 2d 568, 576 (Sup. Ct. 1974) (citing *Lessard* with approval).

*(Footnote continued on following page)*



Appellants' other attempts to inject "empirical" data, simply fall wide of the mark. They suggest that "the relative uncertainty of diagnosis in the area is often exaggerated and sensationalized," Ab at 42, citing only to an as-yet-unpublished critique[41] of the Rosenhahn study,[42] and Chief Justice Burger's concurring opinion

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*(Footnote continued from preceding page)*

See Epstein and Lowinger, "Do Mental Patients Want Legal Counsel? A Survey," 45 *Am. J. Orthopsychiat.* 88, 91-92 (1975) (majority of patients studied indicated need for legal aid in both court-related hospitalization proceedings as well as in non-hospital-related matters). The authors note that the effects of legal aid would include a diminution of the numbers of persons involuntarily committed, heightened efficiency of hospital operations (counsel serving as an effective check to insure the presence of therapy), and a change in the image of the hospital as a "total institution." Significantly, the authors point out that the process of conducting the survey was "not traumatic to either the patient or the institution."

[41] Roth, "Some Comments on Labeling,"—*Bull. Am. Acad. Psych. & L.*—(1976).

[42] Rosenhahn, "On Being Sane in Insane Places," 179 *Science* 250 (1973). The Rosenhahn methodology has been the subject of extensive debate and cross-debate in the scientific community. See, *e.g.,* Fleischman, "Letters," 180 *Science* 356 (1973); Israel, *id.* at 358; Burr, *id.;* Hoaken, *id.;* Thaler, *id.;* Zucker, *id.* at 360, Hanley, *id.;* Ostow, *id.* at 361; Lieberman, *id.;* Hunter, *id.;* Pinsker, *id.* at 362; Blair, *id.* at 363; Reich, *id.;* Wiedeman, *id.* at 364; Pattison, *id.* at 365; Rosenhahn, *id.* at 366; Weiner, "'On Being Sane in Insane Places': A Process (Attributional) Analysis and Critique," 84 *J. Abnormal Psychol.* 433 (1975); Spitzer, "On Pseudoscience in Science, Logic in Remission, and Psychiatric Diagnosis: A Critique of Rosenhahn's 'On Being Sane in Insane Places,'" 84 *J. Abnormal Psychol.* 442 (1975); Crown, "'On Being Sane in Insane Places': A Comment from England," 84 *J. Abnormal Psychol.* 453 (1975); Millon, "Reflections on Rosenhahn's 'On Being Sane in Insane Places,'" 84 *J. Abnormal Psychol.* 456 (1975); Rosenhahn, "The Contextual Nature of Psychiatric Diagnosis," 84 *J. Abnormal Psychol.* 462 (1975).

in *O'Connor* v. *Donaldson*, 422 U. S. 563, 584 (1975). They argue further that, if indeed there is uncertainty, that uncertainty "only serves to emphasize the questionable worth of having judges, completely untrained in the field of psychiatry, issuing diagnoses, prescribing treatment, or even choosing between two conflicting diagnoses." Ab at 43. This approach, unfortunately, misreads both existing case law and virtually all empirical, legal, and behavioral studies done in this area.[43]

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[43] The evidence demonstrates that psychiatrists are no more significantly predictively accurate than non-psychiatrists (*e.g.*, lawyers). See Rappeport, Lassen, and Gruenwald, "Evaluation and Follow-up of Hospital Patients who had Sanity Hearings," in Rappeport ed., *Clinical Evaluation of the Dangerousness of the Mentally Ill* 89 (1969) ("The comparison between court released and hospital released adjustment rates shows no significant difference in the predictive accuracy of either institution"), and Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 *Calif. L. Rev.* 693, 749 (1974) (no evidence found that a psychiatrist can predict dangerousness more accurately than a lawyer). In fact, a recent report prepared by the American Psychiatric Association concludes that "neither psychiatrists not anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness.'" American Psychiatric Association, *Clinical Aspects of the Violent Individual* 28 (1975).

Of course, in the famous study of the so-called "Baxstrom patients" (those persons ordered released from New York's maximum security facilities for "insane criminals" following this Court's decision in *Baxstrom* v. *Herold*, 383 U.S. 107 (1966)), it was found that, of the 969 *Baxstrom* patients who had previously been statutorily incarcerated in maximum security facilities, within one year, only *seven* were recommitted to such a facility on a finding of dangerousness (although it had been predicted by hospital officials that nearly 250 would need that type security), and, of the 147 patients released to the community, only *one* had been arrested within that time period (for petty larceny). Hunt and Wiley, "Operation Baxstrom After

*(Footnote continued on following page)*



First, in its decision last year in *O'Connor*, this Court characterized a similar argument as "unpersuasive", adding:

> Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present. 422 U. S. at 574, n. 10.

Indeed, as Federal Judge David Bazelon has pointed out:

> When the limited function of a judge in reviewing administrative determinations is borne in mind, there seems little to distinguish psychiatry from, say, radio broadcasting. No judge would claim the ability to provide a particular therapy for a

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*(Footnote continued from preceding page)*

One Year," 124 *Am. J. Psychiat.* 124 (1968), reprinted in Association of the Bar of the City of New York, *Mental Illness, Due Process and the Criminal Defendant* 224 (1968). The *Baxstrom* patients have received special behavioral scrutiny. See, *e.g.*, Steadman, "Follow-up on Baxstrom Patients Returned to Hospitals for the Criminally Insane," 130 *Am. J. Psychiat.* 317 (1973); Steadman and Cocozza, *Careers of the Criminally Insane* (1974). For a more recent evaluation and survey of the relevant literature, see Steadman and Cocozza, "We Can't Predict Who Is Dangerous," *Psychology Today* 32 (January 1975). See also, *e.g.*, Dershowitz, "The Law of Dangerousness: Some Fictions About Predictions," 23 *J. Legal Ed.* 24 (1971); Steadman, "Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry," 1 *J. Psych. & L.* 409 (1973); Wenk, Robison and Smith, "Can Violence Be Predicted?" 18 *Crime & Delinq.* 393 (1972); Kozol, Boucher, and Garofola, "The Diagnosis and Treatment of Dangerousness," 18 *Crime & Delinq.* 371 (1972); Dershowitz, "Dangerousness as a Criterion for Confinement," 2 *Bull. Am. Acad. Psych. & L.* 172 (1974).

> "chronic undifferentiated schizophrenic." But neither would any judge allocate frequencies to avoid interference. That is not his task in any case; his role rather is to determine whether a capable expert has studied the problem fully and reached a defensible result.

Bazelon, "Implementing the Right to Treatment," 36 *U. Chi. L. Rev.* 742, 745 (1969); see also, Bazelon, "Psychiatrists and the Adversary Process," *Scientific Am.*, Vol. 230, No. 6 (June 1974), at 18, 23.[44]

Similarly, whereas it has been suggested that the presence of counsel at an involuntary civil commitment proceeding for adults "wholly abdicates medical considerations in favor of a monolithic dedication to legalisms," Stone, *supra* at 58 (quoting other doctors) or that it might prove detrimental to the patient's medical interests, Kadish, "A Case Study in the Signification of Procedural Due Process—Institutionalizing the Mentally Ill," 9 *W. Pol. Q.* 93, 96 (1956), and that—often—counsel itself provides "little more than *pro forma* representation [to]

[44] Appellants' arguments closely mirror those made by Judge Paul Alexander of Ohio: that, in extending the panoply of procedural due process rights to juveniles, "we open the door to a number of undesirable and potentially dangerous factors; so that . . . we may be doing him a disservice, and injustice," Alexander, "Constitutional Rights in Juvenile Court," 46 *A.B.A.J.* 1206, 1210 (1960), as quoted in Kittrie, *The Right to be Different* 140 (Pelican ed. 1973). It is suggested that this "fear of undue process," noted by Kittrie, *id.* at 156, is similarly inapplicable to the instant matter. Just as this Court's "vigorous exten[sion]" of procedural due process to children, "Volunteering Children," *supra*, at 876, has been neither a "disservice" nor an "injustice" to them, its logical continuation to the civil commitment process could take place without the feared exacerbation of familial relationships.



the allegedly mentally ill," Litwack, 62 *Calif. L. Rev., supra,* at 818, courts have consistently held that the right to counsel does apply to such proceedings "in which the liberty of an individual is at stake . . . whether [or not] the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency," *Heryford* v. *Parker,* 396 F. 2d 393, 396 (10 Cir. 1968); see also cases cited at Point III, pp. 36-37, *infra.*[45]

In cases involving the right of a mentally handicapped child to a free public education, see, *e.g., Pennsylvania Association for Retarded Children* v. *Pennsylvania,* 343 F. Supp. 279, 303-306 (E.D. Pa. 1972), [hereinafter *P.A. R.C.*] wherein each child is entitled to a due process hearing as to his placement and/or special class assignment, such judicial intervention had been seen by some as "a substantial threat to the stability of the education system," Weintraub and Abeson, "Appropriate Education for all Handicapped Children: A Growing Issue," 23 *Syr. L. Rev.* 1037, 1057 (1972), as an infringement upon the "exclusive province of the schools," Kirp and Kirp, "The Legalization of the School Psychologists' World," 14 *J.*

[45] Of course, in other areas of substantive law involving the rights of those institutionalized in psychiatric facilities, Federal courts have willingly applied to juvenile cases the reasoning of decisions originally rendered in matters involving adults. See, *e.g., Morales* v. *Turman,* 364 F. Supp. 166, 175 (E.D. Tex. 1973) supplemented 383 F. Supp. 53 (E.D. Tex. 1974), applying the law of *Wyatt* v. *Stickney,* 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), aff'd *sub. nom. Wyatt* v. *Aderholt,* 503 F. 2d 1305 (5 Cir. 1974) (right to treatment); *King* v. *Carey,* 405 F. Supp. 41 (W.D.N.Y. 1975), applying the law of *Wyatt, supra* (appliciability of Thirteenth Amendment), and *Souder* v. *Brennan,* 367 F. Supp. 808 (D.D.C. 1973) (right to compensation for labor providing consequential economic benefits to institution).

*School Psychol.* 83, 87 (1976),[46] and had been greeted, in some quarters, by "willful noncompliance" on the part of school districts, "Legal Reform," *supra,* at 52, quoting First and Interim Report of the Masters at 69 (filed Aug. 2, 1973), in *P.A.R.C., supra,* and by "resistance" on the part of many vocational educators, "Legal Reform," *supra* at 71-72. See generally, Herr, "Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded," 23 *Syr. L. Rev.* 995 (1972).

Interestingly, although counsel at due process hearings was not made mandatory,[47] parents represented by counsel were "significantly more likely to win a favorable ruling" than those not so represented, "Legal Reform," *supra* at 79, results which closely parallel findings of similar surveys involving involuntary civil commitment hearings, see, *e.g.,* articles cited at point II, p. 22, *supra.* Significantly, in discussing the scope of the due process hearing, Kirp, Buss and Kuriloff point out:

[46] Similarly, following the decision of the District Court in *Mills* v. *Board of Education,* 348 F. Supp. 866, 875 (D.D.C. 1972) (due process requires a hearing prior to "exclusion, termination or classification into a special program"), a teachers' union leader direly warned that his group could not be "held responsible for the education of any child in the district while forced [by *Mills*] to keep unruly children in school." Kirp, Buss and Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 *Calif. L. Rev.* 40, 89 (1974) [hereinafter "Legal Reform"], quoting *Washington Post,* May 2, 1973, at C-1, Col. 7. *Cf. Goss* v. *Lopez,* 419 U.S. 565 (1975).

[47] Under the *P.A.R.C.* decree, a parent is notified he has the "right to be represented at the [due process] hearing by any person of his choice, including legal counsel," 343 F. Supp. at 304, but no explicit provision is made for appointment of counsel to the indigent.



> It is wrong, of course, to assume that the parents' and the child's interests will never vary. Sometimes they will clearly conflict. For example, a parent may want to "get rid of" a child he considers a nuisance or a burden, or might resist appropriate and beneficial placement in a particular special education program because he fears some resulting stigma. Often such conflicts cannot be detected, and, to some extent, parent-child conflicts must simply be tolerated. Nevertheless, the governing procedures should include a provision for appointment of a guardian *ad litem* to represent the child's separate interests when there is evidence of a significant conflict of interest.

"Legal Reform," *supra,* at 125-126.

On the other hand, arguments similar to those made by appellees have been specifically echoed in scholarly and professional literature concerned with due process and the placement of juveniles. Speaking of custody and divorce proceedings, Anna Freud, Joseph Goldstein and Joseph Solnit argue forcefully that the presumption that a child's parents are "generally best suited to represent and safeguard his interests . . . shoud not prevail [where neither parents nor the State] . . . have a conflict-free interest in representing the child." Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* 65-66 (1973). In such cases it is "crucial [to make] . . . adequate provision for [the child's] . . . personal representation by counsel who has no other goal than to determine what is the least detrimental alternative for his client." *Id.* at 66. See also, Kleinfield, "The Balance of Power Among Infants, Their Parents, and the State," Part I, 4 *Fam. L.Q.* 320, 323, 324 (1970) ("[W]ithout counsel, rights [of children] not only fail to be vindicated; they

fail also to be created"); Note, "On the Voluntary Admission of Minors," 8 *Mich. J. Law Reform* 189, 213-214 (1974) ("In almost any context in which the status, position, or future placement of a minor is involved, the minor should be provided with counsel. It is simply unrealistic for another party to an action, who had his own interests with which to be concerned, to be expected to adequately safeguard those of a minor involved in the matter)."[48]

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[48] Accord, Kleinfield, 4 *Fam.L.Q., supra,* at 347; Katz, "Children, Privacy and Nontherapeutic Experimentation," 45 *Am. J. Orthopsychiat.* 802, 807 (1975); Knitzer, "Child Advocacy: A Perspective," 46 *Am. J. Orthopsychiat.* 200 (1976).

This Court has articulated this argument in a similar context just last month in *Planned Parenthood of Central Missouri* v. *Danforth,* 44 U.S.L.W. 5197, 5203-5204 (July 1, 1976), in striking down a Missouri statute which had required parental or other guardian consent to most first trimester abortions if the woman involved was under 18 and unmarried. Although the Court noted that the Federal District Court had suggested there was a significant state interest in the safeguarding of the family unit and of parental authority, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975), it rejected this as an across-the-board rule:

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

*Id.* at 5204. *Cf. In re Smith,* 16 Md. App. 209, 295 A. 2d 283 (Ct. Spec. App. 1972) (mother could not force teenage daughter to have an abortion under applicable state law).



Thus, in his seminal article on the right of children to independent counsel prior to "voluntary" civil commitment, Mental Health Law Project staff attorney James Ellis reviews the development of due process safeguards at juvenile delinquency proceedings and at involuntary civil commitment matters, notes the "negligible role" currently played by counsel in the juvenile commitment process, "Volunteering Children," *supra,* at 881, and sketches the multiple roles that independent counsel should have at such a hearing, including *inter alia,* ascertaining the juvenile's true wishes, explaining possible outcomes to the client (including specifically, potential restrictivity of setting, alternative treatment modalities, facility regulations, etc.), counseling the client on consequences of hospitalization, and "present[ing] . . . [the client's] wishes in as effective a manner as possible." *Id.* at 888-889. He adds further, in an effective partial response to appellants' arguments here:

> Finally, while the lawyer should try to avoid becoming a middle person in future power struggles between the client and the hospital (or parents) because of the detrimental impact that might have on the client's acceptance of ordered treatment, it is appropriate for the attorney to reassure the client that counsel will again be available at the time of the periodic review of commitment, and may also be available if problems arise concerning in-hospital civil liberties. The knowledge that there is someone on the "outside" who is concerned about his or her fate after hospitalization may be one of the most valuable things a lawyer can give to a child-client.

*Id.* at 890 (footnote omitted).[49]

It is suggested that the District Court decision in this matter correctly perceived the importance of the need for "someone on the 'outside'," *id.*, in the same manner as this Court has found such a need to exist in the parallel area of juvenile delinquency proceedings, and as other courts have found in matters involving both involuntary hospitalization and educational placements of the non-institutionalized.

## III. The District Court was correct in holding that the guarantees required by due process apply to civil commitment proceedings for juveniles.

*Amicus curiae,* Division of Mental Health Advocacy, supports appellees' contention before this Court that the findings and judgment of the court below should be affirmed insofar as they rectify certain constitutional deficiencies in a statutory commitment scheme such as that in effect in Pennsylvania.[50] Clearly, the state must provide substantial procedural protections to individuals facing involuntary civil commitment, to prevent the occurrence of erroneous confinements, *Specht* v. *Patterson,* 386 U. S. 605, 608 (1967); *Lynch* v. *Overholser,* 369 U. S. 705, 735 (1962). This Court has consistently reaffirmed this principle in affording persons confined to mental institutions protection of their constitutional rights. *O'Connor* v. *Donaldson,* 422 U. S. 563 (1975); *McNeil* v. *Director, Patuxent Institute,* 407 U. S. 245 (1972); *Humphrey* v. *Cady,* 405 U. S. 504 (1972); *Jackson* v. *Indiana,* 406 U. S. 715 (1972); *Baxstrom* v. *Herold,* 383 U. S. 107 (1966); *Specht* v. *Patterson, supra.*

Moreover, courts confronted with the issue of procedural protections for juveniles in commitment matters, have held the juveniles entitled to such protections, *Kidd* v. *Schmidt,* 399 F. Supp. 301 (E.D. Wis. 1975); *Saville* v.

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[49] Stone, *supra,* at 59, makes approving reference to a similar list of attorney functions prepared by Cohen, 44 *Tex. L. Rev., supra,* similar to the ones suggested by Ellis, and notes:

> Surely, some of the aforementioned functions are social service roles which far transcend what has traditionally been viewed as the attorney's function, but if the attorney does not fill some of these needs, it is unlikely that anyone else will; and without aid of counsel, commitment can easily become a summary or self-fulfilling process. There are, increasingly, lawyers who understand and are willing to fill these needs. And if counsel come to be perceived as co-workers in the mental health system, dedicated to the aforementioned array of purposes, and not merely as righteously contentious obstructors, their presence during the commitment process will be welcomed rather than dreaded.

See also, Stone, *supra,* at 233-237.



[50] It is the understanding of *amicus* that certain amendments to the Pennsylvania Mental Health and Mental Retardation Act (50 *P.S.* §§ 4402, 4403) concerning commitment proceedings of juveniles have recently been passed by the Pennsylvania Legislature. The apparent effect of these amendments (Senate Bill 1025) is (1) to lower from 18 to 14 the age at which a juvenile may voluntarily apply for admission to treatment under the Act, (2) to permit the parent, guardian, or person *in loco parentis* of a minor between the ages of 14 and 18 to object to such an application, and (3) to permit "any responsible party" to petition, on behalf of a minor under the age of 14 in voluntary treatment, for withdrawal from or modification of such treatment, whereupon an attorney is to be appointed for the minor and a hearing held within ten days of receipt of the petition, to determine what inpatient treatment, if any, is in the minor's best interest. The amended act apparently makes no changes in commitment procedures for mentally ill juveniles under 14 years of age. Furthermore, the amendments have no effect whatsoever on commitment proceedings for mentally retarded juveniles.

*Treadway,* 404 F. Supp. 430 (M.D. Tenn. 1974); *Heryford* v. *Parker,* 396 F. 2d 393 (10 Cir. 1968). The likelihood of confinement compels the imposition of strict procedural protections, *In re Gault,* 387 U. S. 1 (1967); nor does the fact that the commitment is geared towards rehabilitative ends, and not for punitive purposes, obviate the need for such procedural scrutiny, *cf. Breed* v. *Jones,* 421 U. S. 519 (1975). The protections ensured by the court below in the name of constitutional due process guarantees should be reaffirmed by this Court.

**A. The right to counsel.**

The necessity for legal representation—including the right to appointed counsel where an individual, for any reason, is unable to retain his own—in proceedings which attempt to deprive an individual of his liberty has long been recognized by courts throughout the country. The United States Supreme Court has consistently vindicated this right in a line of cases dating from *Powell* v. *Alabama,* 287 U. S. 45 (1932), to *Argersinger* v. *Hamlin* 407 U. S. 25 (1972). Beginning with the premises that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," *Powell,* 287 U. S., *supra* at 69, the Supreme Court reaffirmed that basic right in criminal felony proceedngs, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), in juvenile delinquency proceedings, *In re Gault, supra,* and in trials for petty offenses, *Argersinger,* 407 U. S., *supra,* at 37.

Drawing, in part, on the precedents established in the context of criminal proceedings, a number of courts have undertaken an examination and enumeration of due process guarantees attaching to the civil commitment process. A review of those cases indicates that the right to counsel



is clearly emerging as a fundamental prerequisite to the constitutionality of such proceedings. In *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), vacated on other procedural grounds 414 U. S. 473 (1974), on remand 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded on other grounds 421 U. S. 957 (1975), the original three-judge district court held unconstitutional a state statutory civil commitment scheme similar to that of Pennsylvania, and mandated a panoply of rights and protections to be enforced in civil commitment proceedings, including: timely notice of "charges"; a speedy hearing on final disposition; exclusion of hearsay evidence; privilege against self-incrimination; notice of rights, including right to a jury trial; and the right to representation by counsel at the hearing. In treating the right to counsel specifically, the *Lessard* Court held: "We agree that the importance of the interests involved makes imperative the assistance of counsel as soon after proceedings are begun as is realistically feasible." *Lessard I,* 349 F. Supp., *supra* at 1099. The judicial foundation on which the *Lessard* Court established the constitutional right included *Powell, Argersinger,* and *Gault,* all *supra. Id.* at 1098.

In *Heryford* v. *Parker, supra,* the court was confronted with a *habeas corpus* petition by a mother on behalf of her nine-year-old son who had been committed to the Wyoming State Training School for the feeble-minded and epileptic. The three-judge panel held that due process required the appointment of counsel at a hearing aimed at the involuntary commitment of a mentally deficient indigent individual. The *Heryford court* specifically rejected the "civil/criminal" distinction, focusing instead on the likelihood of involuntary confinement as the basis for the right.

> Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae,* it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. 396 F. 2d at 396.

*Dixon* v. *Attorney General of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971) was a class action brought by inhabitants of a state hospital attacking the constitutionality of various provisions of the state civil commitment law. In finding that the challenged law violated due process in several regards, the court expressly ordered, with respect to all further involuntary commitment proceedings, that "[t]he subject thereof shall be informed of his right to counsel and an attorney shall be appointed to represent him unless he can afford to retain an attorney himself." 325 F. Supp. at 974. Other courts have reached the same result and, in so doing, have also rejected the *parens patriae* doctrine and the "civil/criminal" distinction as justification for deprivation of the constitutional right to counsel in these proceedings. *In re Barnard,* 455 F. 2d 1370 (D.C. Cir. 1971); *Denton* v. *Commonwealth,* 383 S.W. 2d 681 (Ky. App. 1964); *State ex rel. Hawks* v. *Lazaro,* 202 S.E. 2d 109 (W. Va. Sup. Ct. App. 1974); *In re Fisher,* 39 Ohio St. 2d 71, 313 N.E. 2d 851 (Sup. Ct. 1974). See also, *State ex rel. Richey* v. *Superior Court,* 59 Wash. 2d 872, 371 P. 2d 51 (Sup. Ct. 1962). There are numerous other cases in which state and federal courts have found a constitutional right to representation by counsel in commitment proceedings and, where a person



cannot afford to retain counsel, to have counsel appointed. See, *e.g., In re Hayes,* 18 N.C. App. 560, 197 S.E. 2d 582 (Ct. App. 1973); *In re Collman,* 9 Ore. App. 476, 497 P. 2d 1233 (Ct. App. 1972); *In re Adams,* 497 P. 2d 1080 (Okla. Sup. Ct. 1972); *People* v. *Potter,* 85 Ill. App. 2d 151, 228 N.E. 2d 238 (App. Ct. 1967); *In re Popp,* 33 *Ohio* App. 2d 22, 292 N.E. 2d 330 (Ct. App. 1972). *Cf. McCorkle* v. *Smith,* 100 N. J. Super. 595, 242 A. 2d 861 (App. Div. 1968), and *In re Geraghty,* 68 N. J. 209, 343 A. 2d 737 (1975).

The net effect of the holdings in these cases is the judicial determination that the right to counsel in civil commitment proceedings is of the same constitutional magnitude as that right in criminal proceedings. Whether the purpose of the confinement be therapeutic or punitive, whether the proceeding is labeled "civil" or "criminal", whether the state claims to act in the name of *parens patriae* or in the name of its police power, due process demands that an individual facing involuntary commitment be afforded the opportunity to consult with and rely on legal counsel.[51]

**B. The right to notice.**

It is axiomatic that due process mandates that adequate notice and an opportunity to be heard by given to individuals before the state may deprive them of their liberty and property, *Mullane* v. *Central Hanover Bank,* 339 U. S. 306 (1950), that this notice be sufficient to give the recipient "reasonable opportunity to prepare" and set forth the basis for any detention, *In re Gault,* 387 U. S., *supra*

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[51] For a further discussion of the practical effects of providing counsel at involuntary commitment proceedings, see Point II, *supra.*

at 33, and that it be sufficiently specific to inform the recipient of the character of the proceedings and the issues in question, *Goldberg* v. *Kelly,* 397 U. S. 254, 267-268 (1970). See also, *Morrisey* v. *Brewer,* 408 U. S. 471, 488-489 (1972) (notice at parole revocation hearing); *Gagnon* v. *Scarpelli,* 411 U. S. 778 (1973) (probation revocation hearings); *Wolff* v. *McDonnell,* 418 U. S. 539 (1974) (prison disciplinary hearings); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), reh. den. 409 U. S. 902 (1972); *Avant* v. *Clifford,* 67 N. J. 496, 341 A. 2d 629 (1975); *State* v. *Holmes,* 109 N. J. Super. 180, 183, 262 A. 2d 725 (Law Div. 1970).

In an analogous situation, state statutes similar to the one under consideration were struck down by a three-judge Federal District Court as being violative of due process. In the lead case of *Lessard* v. *Schmidt, supra,* a set of Wisconsin statutes permitting temporary involuntary confinement without a judicial hearing was declared unconstitutional because of the "significant deprivation of liberty" involved in a "16 or 26 day" period of confinement; there, the court relied heavily on *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1971), which held that an individual must "be given an opportunity for a hearing before he is deprived of any significant property interest . . .," noting that an individual's interest in liberty is "even more compelling" than in property rights, *Lessard I,* 349 F. Supp., *supra* at 1091; *Lessard II,* 379 F. Supp., *supra* at 1378-1379. Further, *Lessard* extended the notice requirement beyond the factual basis of the allegations, to encompass, *inter alia,* the patient's right to a jury trial, the standards for detention, the names of witnesses testifying in support of detention, and the substance of their proposed testimony. *Lessard I,* 349 F. Supp., *supra* at 1092; *Lessard II, supra.*



As noted by the District Court in the instant case, written notice ("including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment") is constitutionally required and "should not shield children in need of institutionalization from commitment and treatment but rather should protect children not in need of institutionalization from wrongful commitment and improper deprivation of their liberty." *Bartley* v. *Kremens,* 402 F. Supp. 1039, 1050 (E.D. Pa. 1975).

**C. The right to be present at the hearing.**

The due process right to be present at any hearing in which a deprivation of some right may result is a well-established principle of constitutional law, *Goldberg* v. *Kelly,* 397 U. S., *supra* at 268-269, and this principle has specifically been invoked to require the presence of the person subject to commitment at all judicial proceedings conducted for that purpose, *Specht* v. *Patterson,* 386 U. S., *supra* at 610; *Lessard I,* 349 F. Supp., *supra,* and *Lessard II,* 379 F. Supp., *supra; Bell* v. *Wayne County General Hospital,* 384 F. Supp. 1085, 1094 (E.D. Mich. 1974); *Lynch* v. *Baxley,* 386 F. Supp. 378, 388-389 (M.D. Ala. 1974); *State ex rel. Hawks* v. *Lazaro,* 202 S.E. 2d, *supra* at 125.

This right should be absolute, unless (1) the patient wishes to knowingly, voluntarily and intelligently waive his right to be present (see, *e.g., Johnston* v. *Zerbst,* 304 U. S. 458 (1938)), or (2) the patient is so continually and persistently disruptive that the hearing cannot be conducted. These are the only legitimate reasons for barring a criminal defendant from his own trial, *Illinois* v. *Allen,* 397 U. S. 337, 342-343 (1970), reh. den. 398 U. S. 915

(1970), and should be the only ones to justify exclusion at a commitment hearing. *Bell* v. *Wayne County General Hospital, supra; Lynch* v. *Baxley, supra;* Singer, "Civil Commitment Proceedings: A Response to 'A Trial Judge's View' ", 98 *N. J. L. J.* 553, 568 (June 26, 1975);[52] see generally, "Developments," 87 *Harv. L. Rev., supra* at 1282-1283.

The court below specifically adopted the *Lynch* v. *Baxley* procedure as appropriate, in holding that "a child has a constitutional right to be present at all hearings concerning his proposed commitment," subject to waiver under certain specified conditions. 402 F. Supp., *supra* at 1051.

**D. Rights at the commitment hearing.**

It has, of course, long been axiomatic that a criminal defendant is constitutionally entitled to cross-examine and confront witnesses against him, *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965). It should be equally apparent that these rights are applicable to involuntary commitment proceedings, *Specht* v. *Patterson, supra; Millard* v. *Harris,* 406 F. 2d 964, 973 (D.C. Cir. 1968); *Lynch* v. *Baxley,* 386 F. Supp., *supra* at 394; *State ex rel. Hawks* v. *Lazaro,* 202 S.E. 2d, *supra* at 124-125; *Dixon* v. *Attorney General of Pennsylvania,* 325 F. Supp., *supra* at 972, 974; *People* v. *English,* 31 Ill. 2d 301, 201 N.E. 2d 455, 458 (Sup. Ct.

[52] *Cf.* N. J. Ct. R. 4:74-7(e): "The patient shall be required to appear at the hearing, but may be excused from the courtroom upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony."



1964); see also *In re Gault,* 387 U. S., *supra,* at 10. If a plenary hearing is to have any meaning, and if the court is to make a knowing and intelligent determination of the question of mental illness based on intensive scrutiny of the fullest possible proofs, then due process requires a statutory scheme which ensures the right to be heard—both through one's own witnesses and evidence, *Dixon* v. *Attorney General of Pennsylvania,* 325 F. Supp., *supra* at 974, and through confrontation of witnesses and evidence offered in support of commitment, *Lynch* v. *Baxley,* 386 F. Supp., *supra* at 394. The holding of the court below along these lines should be affirmed.

**E. The standard of proof.**

On the question of standard of proof, *amicus* respectfully takes issue with the lower court's determination that "clear and convincing proof" is sufficient. The very principles which that court cites, concerning the highly subjective nature of the evidence in commitment proceedings, the potential loss of liberty, and the stigmatization likely to result from institutionalization, would reasonably mandate the highest standard possible. It is interesting to note that *Lynch* v. *Baxley, supra*—cited by the lower court in support of the "clear and convincing" standard—calls for "clear, *unequivocal,* and convincing evidence that the subject is in need of confinement . . ." 386 F. Supp. at 393 (emphasis added), indicating that something higher than "clear and convincing" proof is required. Clearly, proof beyond a reasonable doubt is the most unequivocal of standards; certainly the quantum of proof it

requires is more compelling than that of clear and convincing evidence.[53]

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[53] The current standard of proof for commitments in New Jersey apparently is "a preponderance of the evidence." The New Jersey Supreme Court adopted this standard for civil commitments of defendants acquitted of criminal charges by reason of insanity. *State* v. *Krol*, 68 N. J. 236, 257, 344 A. 2d 289, 301 (1975). In imposing this lower standard, the court acknowledged the "trend in recent cases to require a burden of proof in civil commitment cases greater than simple preponderance of the evidence [citations omitted]," 68 N. J. at 257, 344 A. 2d at 301, n. 9, and supported its holding by reference to recent cases which hold that "a standard of preponderance of the evidence is sufficient *for commitment of persons acquitted by reason of insanity.*" *Id.* (emphasis added). In imposing this standard in the context of civil commitments of criminal defendants acquitted by reason of insanity, the majority opinion in *Krol* refers to, and apparently incorporates, the use of the "preponderance" standard to prove insanity at the time of the commission of the offense. It may well be argued that the use of the "preponderance" standard in the prior proceeding (resulting in an acquittal with a finding of insanity) accounts for its use in the subsequent civil commitment proceeding envisioned by the *Krol* majority. In this context, note the discussion by Justice Clifford, in dissent:

> The difficulty in making the critical determination, that defendant is mentally ill, and poses a danger to himself or society if not restrained, militates in favor of the higher burden of proof beyond a reasonable doubt to reduce the substantial opportunity for error particularly when as here, the consequence of that error is loss of liberty.
>
> 68 N. J. at 267, 275, 344 A. 2d at 306, 310 (Clifford, J. dissenting)

Insofar as the standard of proof issue has been considered by New Jersey courts in the context of civil commitment proceedings outside the criminal sphere, the standard of beyond a reasonable doubt has been applied. *In re Heukelekian*, 24 N. J. Super. 407, 94 A. 2d 501 (App. Div. 1953); *In re Perry*, 137 N. J. Eq. 161, 43 A. 2d 885 (1945). *Amicus* submits that this standard is warranted in the interest of preventing wrongful institutionalization of individuals (particularly juveniles) whose confinement is sought solely on an allegation, often highly subjective in nature, of mental illness. See, *e.g.*, "Developments", 87 *Harv. L. Rev.*, *supra* at 1302.



## CONCLUSION

**On the basis of the foregoing, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.**

Respectfully submitted,

STANLEY C. VAN NESS
Public Advocate
State of New Jersey
By: MICHAEL L. PERLIN, Director
LAURA M. LE WINN, Deputy Director
*Department of the Public Advocate*
*Division of Mental Health Advocacy*
10-12 North Stockton Street
Trenton, New Jersey 08625
*Amicus Curiae*

Dated: July 23, 1976

[APPENDIX FOLLOWS]

# APPENDIX

**Letter of Barry A. Roth, Assistant Attorney General, Commonwealth of Pennslyvania to David Ferleger, Esq., Attorney for Appellees, dated May 11, 1976**

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
HARRISBURG, PENNSYLVANIA 17120

May 11, 1976

David Ferleger, Esquire
Mental Patient Civil Liberties Project
Suite 1600, 1315 Walnut Street
Philadelphia, Pa. 19107

Re: *Kremens et al.* v. *Bartley et al.*

Dear David:

I have reviewed your May 3, 1976 letter with specific regard to your request to have the following groups participate as *amicus* for which you seek my written consent. Accordingly, you are advised that I consent to participation of the Mental Health Law Project (representing American Psychological Association, National Association for Retarded Citizens, New York Federation of Parents, American Orthopsychiatric Organization); Youth Law Center and Childrens' Defense Fund; National Center for Law and the Handicapped; and the New Jersey Department of the Public Advocate. I await your written consent to participation of the Allegheny Valley Schools.

As always, I shall provide written consent for any reasonable request for responsible amicus to participate in this case as I expect you will do the same.

Very truly yours,

BARRY A. ROTH
Assistant Attorney General

cc: NORMAN WATKINS, Esq.

## Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974

SUPREME COURT OF NEW JERSEY

RICHARD J. HUGHES
Chief Justice

State House Annex
Trenton, New Jersey

# 4—74

November 12, 1974

MEMORANDUM TO: All Assignment Judges, Trial Court Administrators and County Clerks

FROM: Chief Justice Richard J. Hughes

RE: Involuntary Civil Commitment Proceedings

A study recently conducted by the Administrative Office of the Courts indicates that there is a lack of uniformity among the counties in regard to the docketing procedures being followed in civil commitment cases A great divergence of practice occurs in involuntary proceedings, where in many instances, papers are not filed until after the final judgment of commitment (See N.J.S.A. 30:4-56). In addition, lack of adequate docketing procedures has permitted uncontrolled administrative adjournments so the court does not have a written record of the patient's confinement. When notice is filed in the County Clerk's Office, no docket number has been assigned for further control.

In order to standardize procedures throughout the State, all involuntary civil commitment cases shall be handled in the manner described below.



*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

1. DOCKETING

It shall be the responsibility of the Assignment Judge, either personally or through his Trial Court Administrator, to generally supervise the docketing of all involuntary civil commitment proceedings.

Assignment Judges shall arrange with all hospital facilities in their respective vicinages, so that within 72 hours of accepting a person for treatment, they will have forwarded written notification of this acceptance to the following: the County Clerk; the County Adjuster; the patient; and the patient's nearest relative. The Department of Institutions and Agencies will be contacting all state-run facilities directing them to forward notification in the prescribed manner.

Upon receipt of the above notification, it shall be the obligation of the County Clerk to docket the matter in the County Court. All such proceedings shall be docketed according to county, and in the following manner:

| *County* | *Code* | *Case Number* | *Year Committed* |
|---|---|---|---|
| Atlantic | ATCC | 1 | 74 |
| Bergen | BECC | 1 | 74 |
| Burlington | BUCC | 1 | 74 |
| Camden | CACC | 1 | 74 |
| Cape May | CMCC | 1 | 74 |
| Cumberland | CUCC | 1 | 74 |

*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

| *County* | *Code* | *Case Number* | *Year Committed* |
|---|---|---|---|
| Essex | ESCC | 1 | 74 |
| Gloucester | GLCC | 1 | 74 |
| Hudson | HDCC | 1 | 74 |
| Hunterdon | HNCC | 1 | 74 |
| Mercer | MECC | 1 | 74 |
| Middlesex | MICC | 1 | 74 |
| Monmouth | MNCC | 1 | 74 |
| Morris | MRCC | 1 | 74 |
| Ocean | OCCC | 1 | 74 |
| Passaic | PACC | 1 | 74 |
| Salem | SACC | 1 | 74 |
| Somerset | SOCC | 1 | 74 |
| Sussex | SUCC | 1 | 74 |
| Union | UNCC | 1 | 74 |
| Warren | WACC | 1 | 74 |

Consequently, "ATCC 1-74" would refer to the first civil commitment case docketed in Atlantic County in the calendar year 1974.[1]

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[1] Cases shall be docketed on a calendar year, rather than court year, basis. This conforms with the practice now prevalent in the county courts.



*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

2. Assignment of Cases

Assignment Judges shall be given full discretion to assign civil commitment cases.

3. Scheduling of Cases

It shall be the responsibility of the County Clerk to assure that civil commitment hearings on the final order are held within 20 days from the date of initial commitment.

4. Written Notification of Hearing

It shall be the responsibility of the County Clerk to forward written notification of the time and place of the final hearing to the following: the County Adjuster; any assigned or retained counsel for the patient; the patient's nearest relative; and the plaintiff. Written notification shall be served personally upon the patient in accordance with N.J.S.A. 30:4-41.

In all instances mentioned above, written notification shall be transmitted no later than 5 days prior to the date of the hearing.

5. Adjournment Policy

It shall be the responsibility of the Assignment Judge to effectuate either a judgment of commitment or release of the patient as expeditiously as possible; therefore, in the absence of extraordinary circumstances there shall be no more than one adjournment, which shall only be

*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

granted for good cause shown, and the duration of which should not exceed 10 days. If more than one adjournment is granted, a copy of the Order Granting Adjournment, with reasons therefore, shall be forwarded to the Division of Civil Practice, Administrative Office of the Courts, attention Cynthia Jacob.

6. Change in Patient's Status

Assignment Judges shall arrange with all hospital facilities in their respective vicinages to have the medical director or chief of service of said hospitals forward timely notification (which shall be construed as no less than 72 hours if a court hearing has been scheduled) of any substantive change in status to the following: the County Clerk; the County Adjuster; any assigned or retained counsel who may have represented the patient at the last review; the patient's nearest relative; and the plaintiff. Substantive change shall include, but not be limited to: death; discharge; transfer; unauthorized departure; conditional release and return therefrom.

7. Periodic Review

a. It shall be the responsibility of the Assignment Judge to supervise the periodic review of all persons who are now, or may hereafter become, involuntarily committed in their vicinage. For such purposes, docket numbers shall be assigned in the manner described above, with the last two digits reflecting the calendar year of initial commitment.



*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

For all cases initiated after the effective date of this order, the following schedule shall be adopted:

1. A review of the proceedings 6 months after the date of final commitment.
2. A review of the proceedings 12 months after the date of final commitment.
3. A review of the proceedings 18 months after the date of final commitment.
4. A review of the proceedings 30 months after the date of final commitment.
5. A review of the proceedings every two years thereafter.

b. In all cases in which the patient had already been committed prior to the effective date of this order, the following schedule shall be adopted:

1. All patients committed 10 years or more shall have their cases docketed and reviewed by March 1, 1975 with a further review every 2 years from the date of the last review.
2. All patients committed 5-10 years shall have their cases docketed and reviewed by June 1, 1975, with a further review every 2 years from the date of the last review.
3. All patients committed 30 months to 5 years shall have their cases docketed and reviewed by September 1, 1975, with a further review every 2 years from the date of the last review.

*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

4. All patients committed less than 30 months shall be reviewed in accordance with paragraph (a) of this section.[2]

It shall be the obligation of the County Clerk to assure that proper notification of the review shall be given to: the County Adjuster; the executive director or chief of service of the hospital in which the patient is confined; the patient; any assigned or retained counsel for the patient; the patient's nearest relative; and the plaintiff.

Unless requested by any of the parties mentioned in the preceding paragraph, it shall remain within the court's discretion whether to accomplish the review summarily or by means of a plenary hearing; however, if specifically requested, a hearing shall be scheduled.

8. Patient's Right to Appear

It shall be the responsibility of the Assignment Judge to assure that in all instances in which a hearing has been scheduled, that the patient be given every opportunity to appear. If the medical director or chief of service of the mental hospital feels that in his expert opinion it would be prejudicial to the health of the patient, or unsafe to produce the patient at the inquiry, then it shall be the obligation of the medical director or chief of serv-

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[2] Officials at the Department of Institutions and Agencies have assured us that they presently are preparing an internal review of each patient's status on a semi-annual basis. Accordingly, there will be no administrative burden placed upon the institutions themselves in complying with this section of the Directive.



*Memorandum No. 4-74 of Hon. Richard J. Hughes, Chief Justice of the Supreme Court of New Jersey, dated November 12, 1974*

ice to certify in writing to the court his expert opinion concerning the patient's inability to appear, setting forth the facts supporting his conclusion. The hearing judge shall evaluate any certification submitted and determine whether the personal appearance of the patient is feasible. (See N.J.S.A. 30:4-41).

The policy and procedures set forth in this memorandum shall take effect immediately.

cc: County Counsels

County Adjusters

Department of Institutions and Agencies

## New Jersey Court Rule 4:74-7

4:74-7. Civil Commitment

(a) Definitions. The definitions contained in N.J.S.A. 30:4-23 apply to this rule. The classes "A," "B," and "C" referred to in this rule are those defined by N.J.S.A. 30:4-36 to 30:4-38 inclusive. The term "patient" used in these rules means the person whose commitment is sought pursuant to said statutes. The term "psychiatrist" used in these rules means a licensed physician of the State of New Jersey, who shall be either certified or eligible for certification by the American Board of Neurology and Psychiatry.

(b) Commencement of Action. An action for commitment shall be commenced by the filing of a written application, signed by the person seeking the commitment, to which shall be attached the typewritten certificates of two licensed physicians of the State of New Jersey. The certificates shall state with particularity the facts upon which the physician relies in concluding that the patient if not committed would be a probable danger to himself or the community. The form of application shall be prescribed by the Department of Institutions and Agencies subject to the approval of the Administrative Director of the Courts.

(c) Temporary Commitment. A temporary commitment may be ordered based on the application provided for in paragraph (b) of this rule. The order of temporary commitment shall make the following provisions:

1. A place and day certain shall be set for the commitment hearing, which shall be in Class "A" cases not more





than 20 days from the filing of the application, in Class "B" cases not more than 20 days from the date of the temporary order of commitment, and in Class "C" cases not more than 20 days from the date of admission of the patient into the institution. The date shall not be subject to adjournment except that in exceptional circumstances and for good cause shown in open court and on the record the hearing may be adjourned for a period of not more than 10 days.

2. If the patient is unrepresented, the temporary commitment order shall assign counsel to represent him. If the patient is a minor, a guardian ad litem shall be appointed who shall be an attorney. If the court, for good cause shown, appoints a guardian ad litem who is not an attorney, counsel for the guardian ad litem shall also be appointed. Assigned counsel and guardian ad litem fees shall be fixed by the court after hearing and paid pursuant to paragraph (h) of this rule.

3. The persons to be notified of the time and place of hearing, the mode of service of the notice, and the time within which notice must be served shall be specified. In no case, however, shall notice be served less than 10 days prior to the date of the hearing, nor shall any mode of service of the notice on the patient be permitted other than personal service. In addition to the patient and his counsel or guardian ad litem, notice shall also be given to the applicant, the nearest relatives of the patient, the county adjuster, and where the patient is confined to an institution, the superintendent of the institution. Notice may be further ordered to be served on any other person specified by the court.

(d) Discovery. Any rule, regulation or policy of confidentiality notwithstanding, the patient's counsel or guardian ad litem shall have the right to inspect and copy all records relating to the patient's mental condition. The court may direct an independent psychiatric examination of the patient. The cost of said examination and the psychiatrist's fee for testifying, if any, shall be borne by the person or public body charged with the patient's legal settlement.

(e) Hearing. No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral testimony of at least one licensed psychiatrist of the State of New Jersey, who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se.

(f) Final Judgment of Commitment, Review. If the court finds from the evidence presented at the hearing that the institutionalization of the patient is required by



reason of his being a danger to himself or the community if he is not so confined and treated, it shall enter a judgment of commitment to an appropriate institution. The judgment shall provide for review of the commitment no later than (1) six months from the date of judgment, and (2) on or before one year from the date of judgment, and (3) annually thereafter, if the patient is not sooner discharged. All reviews shall be conducted in the manner required by paragraph (e) of this rule.

(g) Judgment of Release. A judgment discharging the patient may contain in appropriate circumstances conditions for the release such as attendance at a non-residential mental health facility or other form of supervision. Any such conditions shall be stated in the order of discharge with particularity. The continuation of any such conditions shall be subject to periodic review as provided by paragraph (f) hereof.

(h) Legal Settlement. The patient's legal settlement providing for the payment of the expense of his care and treatment shall be considered either at the commitment hearing or at a hearing on notice which may be held by the county adjuster thereafter and reported to the court. In either case the settlement shall be on order of the court. The person or public body charged with the legal settlement shall also be charged with the fee of assigned counsel and guardian ad litem and necessary costs incurred by him in representing the patient. If the assigned counsel or guardian ad litem is employed by a legal services project, his fee shall be ordered payable thereto. If he is employed by the State or a county, no fee allowance shall be made.

*New Jersey Court Rule 4:74-7*

i) Filing. All documents referred to in this rule shall be filed in the County Clerk's office together with an affidavit of service of all notices herein required. The files of the County Clerk shall not, however, be open to inspection by any person other than assigned counsel, guardian ad litem and the county adjuster except on court order in exceptional circumstances and for good cause shown.

(j) Commitments of Minors. No minor shall be committed except temporarily to a mental institution for treatment and care of an alleged mental condition on the application of his parent or parents or other person in loco parentis except on court order after hearing pursuant to paragraph (e) hereof. A guardian ad litem who shall be a person other than the applicant for the commitment, shall be appointed by the court to represent the interests of the minor at such hearing.



**Memorandum from David Ferleger, Esq. Certifying Consent of Plaintiffs-Appellees to the Filing of Briefs by *Amici Curiae*, dated July 21, 1976**

David Ferleger Attorney
2321 Sansom Street
Philadelphia, Pennsylvania 19103
(215) 735-8409, 567-2828

July 21, 1976

To: Counsel for Amici in *Kremens* v. *Bartley*, No. 75-1064 (Sup.Ct.)

From: David Ferleger, Esq.

Subject: Consent to Filing of Briefs

This is to certify the consent of plaintiffs-appellees to the filing of briefs amicus curiae in the above case by the following organizations and counsel:

American Bar Association

Youth Law Center

National Juvenile Law Center

Department of the Public Advocate, State of New Jersey

Children's Defense Fund (for plaintiffs in various cases)

Mental Health Law Project (for American Psychological Association, National Association for Mental Health, National Association for Retarded Citizens, National Association of Social Workers, New York Federation of Parents Organizations in New

*Memorandum from David Ferleger, Esq. Certifying Consent of Plaintiffs-Appellees to the Filing of Briefs by Amici Curiae, dated July 21, 1976*

York, National Center on Law and the Handicapped, American Orthopsychiatric Association, United Cerebral Fund)

Michigan Legal Services and Legal Services for Western Michigan (for plaintiffs in Michigan cases)

New York State Bar Association

This consent may be filed in the Supreme Court with your brief which as you know is due by August 4, 1976.

Thank you for your assistance in this matter.

DAVID FERLEGER